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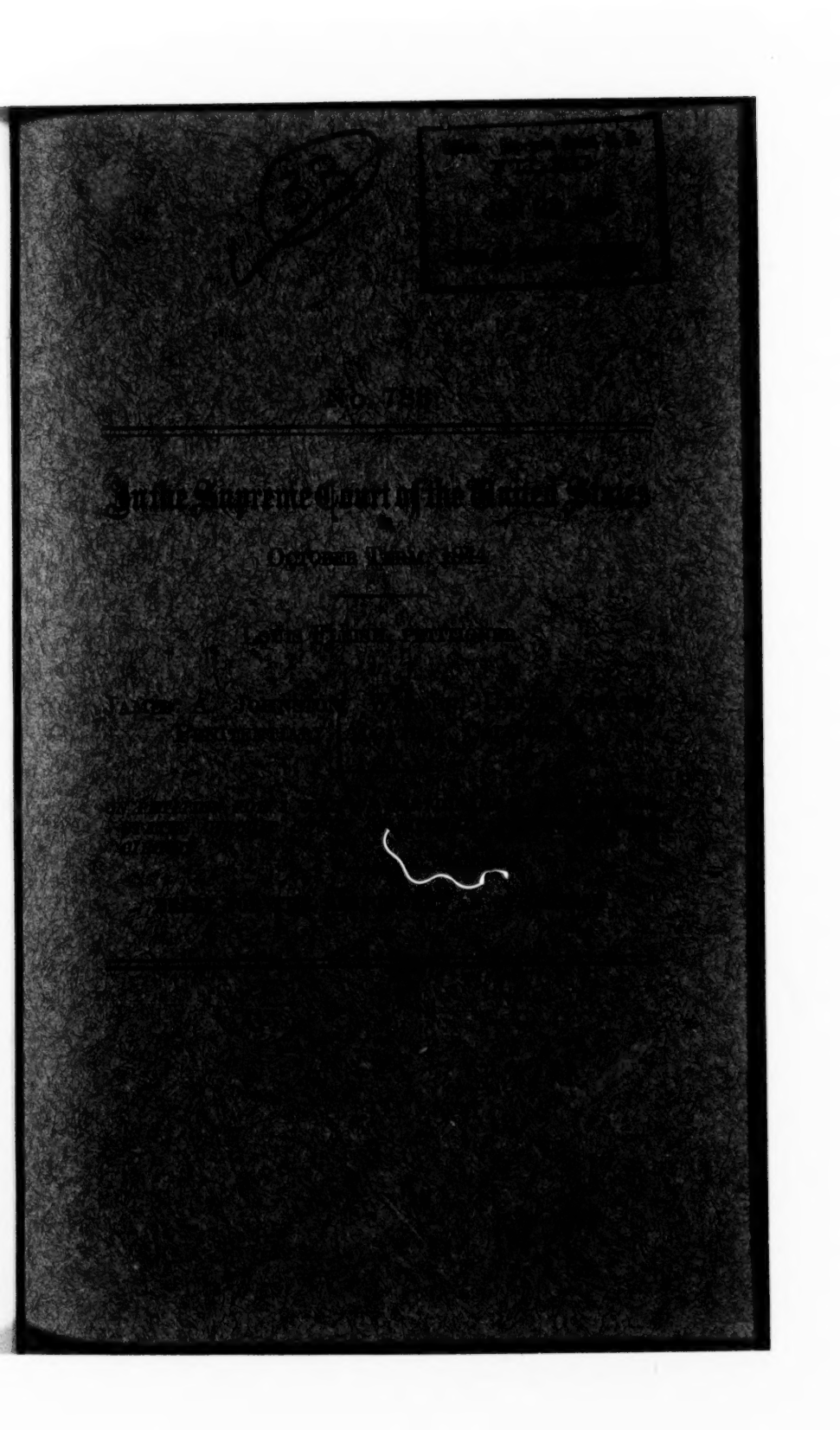
Solicitor General of the United States,
Attorney for Respondent.



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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 783

LOUIS FLEISH, PETITIONER

v.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 13–16) is reported at 145 F. (2d) 16.

JURISDICTION

The judgment of the circuit court of appeals was entered September 29, 1944 (R. 16). The petition for a writ of certiorari was filed December 26, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner is incarcerated pursuant to a judgment imposing consecutive sentences on six counts of an indictment charging violations of the National Firearms Act. Count 1 charged that he received and possessed a firearm which had been transferred in the continental United States and upon which the tax had not been paid. Each of the remaining counts charged that he possessed a different firearm without having registered it with the Collector of Internal Revenue. Petitioner has served his sentence on the first count and the sole question presented is whether he is entitled to be released on habeas corpus on the ground that the remaining sentences are unlawful, because only one offense was charged in the six counts.

STATUTE INVOLVED

The National Firearms Act of June 26, 1934, c. 757, 48 Stat. 1236 ff. (26 U. S. C., 1934 ed., 1132–1132q), provided in pertinent part as follows:[1]

> SEC. 1. (a) The term "firearm" means a shotgun or rifle having a barrel of less than eighteen inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun,

[1] This statute was incorporated in the codification of the Internal Revenue Code by the Act of February 10, 1939, 53 Stat. 1 (26 U. S. C. 2720, 2726, 2729, 2732, 2733, 3261 (b)).

and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition.

* * * * *

SEC. 3. (a) There shall be levied, collected, and paid upon firearms transferred in the continental United States a tax at the rate of $200 for each firearm, such tax to be paid by the transferor, and to be represented by appropriate stamps to be provided by the Commissioner, with the approval of the Secretary; and the stamps herein provided shall be affixed to the order for such firearm, hereinafter provided for. The tax imposed by this section shall be in addition to any import duty imposed on such firearm.

* * * * *

SEC. 5. (a) Within sixty days after the effective date of this Act every person possessing a firearm shall register, with the collector of the district in which he resides, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof: *Provided,* That no person shall be required to register under this section with respect to any firearm acquired after the effective date of, and in conformity with the provisions of, this Act.

(b) Whenever on trial for a violation of section 6 hereof the defendant is shown to have or to have had possession of such firearm at any time after such period of sixty days without having registered as required by this section, such possession shall create a presumption that such firearm came into the possession of the defendant subsequent to the effective date of this Act, but this presumption shall not be conclusive.

SEC. 6. It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of section 3 or 4 of this Act.

* * * * *

SEC. 12. The Commissioner, with the approval of the Secretary, shall prescribe such rules and regulations as may be necessary for carrying the provisions of this Act into effect.

* * * * *

SEC. 14. Any person who violates or fails to comply with any of the requirements of this Act shall, upon conviction, be fined not more than $2,000 or be imprisoned for not more than five years, or both, in the discretion of the court.

STATEMENT

On April 7, 1939, petitioner was convicted in the United States District Court for the Eastern District of Michigan on counts 1, 3, 12, 15, 18 and 21 of an indictment charging violations of the

National Firearms Act (R. 2–3). Count 1 charged that on or about April 27, 1938, petitioner wilfully received and possessed an identified firearm which had been transferred in the continental United States and upon which the firearm tax imposed by Section 3 (a) of the Act had not been paid, in violation of Section 6 of the Act (R. 5). Count 3 charged that petitioner wilfully possessed the same firearm without registering with the Collector of Internal Revenue the number or other mark identifying the firearm, his name and address, his place of business or employment, and the place where the firearm was usually kept, as required by Section 5 (a) of the Act (R. 6). The remaining counts were identical with Count 3, except that each related to a different firearm (R. 6–8).[2] Petitioner was sentenced to consecutive terms of imprisonment for five years on each count and to pay a fine of $2,000 (R. 3).

After he had served the sentence on the first count, petitioner filed a petition for a writ of habeas corpus in the District Court of the United States for the Northern District of California,

[2] Counts 15, 18 and 21 were identical in language and did not specifically identify the particular firearm involved. Petitioner apparently concedes, however, that each of these counts involved a different firearm from that described in counts 1 and 3 (see Pet. 2, 13), and on habeas corpus, since the trial record is not before the court, it must be assumed in support of the judgment that each of these counts related to a different firearm. Cf. *McKee* v. *Johnston*, 109 F. (2d) 273, 275 (C. C. A. 9).

in which he alleged that his continued imprisonment was illegal for the reason that the six counts of the indictment under which he was convicted charged but one offense and that the trial court was therefore without jurisdiction to impose separate sentences on each count (R. 2–3). The respondent filed a return to an order to show cause, and on September 21, 1943, after a hearing, the petition was denied (R. 4, 8). Upon appeal to the Circuit Court of Appeals for the Ninth Circuit the order of the district court was affirmed (R. 16).

ARGUMENT

Petitioner's sole contention (Pet. 13) is that the six counts upon which he was convicted charged but one offense, and that, since he has served the maximum sentence for one offense, respondent is illegally detaining him. His argument runs as follows: First, counts 3, 12, 15, 18, and 21, each of which charged that on or about April 27, 1938, petitioner possessed and failed to register with the Collector of Internal Revenue a different firearm, all involved a simultaneous possession, rather than successive possessions, of the firearms (cf. *Ebeling* v. *Morgan,* 237 U. S. 625). Hence, he was guilty of only one offense under those counts, viz., the illegal possession of unregistered firearms. Accordingly, counts 12, 15, 18, and 21 must be treated as having been merged into count 3 (Pet. 13–17, 18). Second, counts 1

and 3 likewise charged but one offense, for the same evidence would support a conviction under either count. This is true, petitioner asserts, because his failure to pay the tax on the firearm involved in these two counts and to register it are negative averments, which the Government was not required to prove (cf. *Rossi* v. *United States,* 289 U. S. 89; *Crapo* v. *United States,* 100 F. (2d) 996 (C. C. A. 10) (Pet. 18–25)). In our view petitioner's argument is vulnerable in several important respects.

Since petitioner has served only the sentence imposed upon count 1, it is clear that his petition for a writ of habeas corpus is premature if any of the sentences imposed on the remaining counts are valid. *McNally* v. *Hill,* 293 U. S. 131, 138–139; *Holiday* v. *Johnston,* 313 U. S. 342, 349. That petitioner was properly sentenced for more than one offense is hardly open to serious question.

a. Assuming, *arguendo,* that petitioner's argument that counts 1 and 3 involve the same offense, because they relate to the same firearm, is correct, it does not follow that count 1 and either count 12, 15, 18, or 21 state the same offense. Applying the "same evidence" rule for which petitioner contends, it is plain that the evidence necessary to support the conviction under count 1 was not the same as the evidence necessary to support the convictions under these other counts. For in each case proof of possession of a different firearm

was necessary. Petitioner seeks to avoid this conclusion by arguing, without citing any supporting authority, that counts 12, 15, 18, and 21 merged with count 3 (Pet. 18). We submit, however, that petitioner has shown no sound legal basis for invoking a merger theory and that, in fact, his novel argument is without legal support.

b. As we have shown (*supra,* p. 5), counts 3, 12, 15, 18, and 21 were predicated on Section 5 (a) of the Act, which required that "every person possessing a firearm shall register, with the collector of the district in which he resides, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept and place of business or employment." Petitioner's argument in respect of these counts (see *supra,* p. 6), rests on the assumption that the gist of the offense charged in those counts was the possession of the firearms. As we shall show, the assumption is unsound; consequently, his argument is without merit.

Section 5 (a) is plainly directed at securing the registration of every firearm, to the end that with the information thus supplied the remaining portions of the Act may be appropriately enforced. As the circuit court of appeals pointed out (R. 15): "It is evident that the statute requires every firearm to be registered. The registration involves a complete identification of each individual firearm as well as a statement concerning its

present possessor and whereabouts. A record of the latter statement without the identification of the weapon itself obviously would fail to satisfy the terms of the Act. The crime defined by the statute is the failure to register a specific firearm in one's possession, not the failure to indicate generally that one possesses firearms." This view is supported by the legislative history of Section 5 (a) (78 Cong. Rec. 11400) [3] and by the regulations promulgated by the Commissioner of Internal Revenue on August 17, 1934, pursuant to the authority of Section 12 of the Act (26 C. F. R. 307.80).[4] Accordingly, we think it clear, as we argued in our Memorandum in Opposition in *Crapo* v. *Johnston,* No. 567, this Term, certiorari

[3] Congressman Doughton, Chairman of the Ways and Means Committee of the House explained during the discussion of the bill on the floor that it provides that "all those having possession of firearms of the character referred to in this bill, must register the same with the Commissioner of Internal Revenue."

[4] This regulation provided:

> Every person residing in the continental United States in possession of a firearm on July 26, 1934, shall on or before September 24, 1934 (whether or not in his possession on the latter date), register such firearm on Form 1 (Firearms), in duplicate, with the collector for the district in which he resides. The duplicate form, after proper indorsement, will be returned to the registrant by the collector, and the original forwarded to the Commissioner.
>
> A firearm acquired after July 26, 1934, not in conformity with the provisions of the Act, must be registered.

denied, December 4, 1944, that the gist of the offense described by Sections 5 (a) and 14 is the failure to register a firearm, and not mere possession of it. This being true, it follows that in possessing and failing to register five different firearms petitioner committed as to each such firearm the offense made criminal by the Act. Cf. *Ebeling* v. *Morgan,* 237 U. S. 625.

c. In rejecting petitioner's contention that count 1, charging receipt and possession of a firearm upon which the tax had not been paid, and count 3, charging the failure to register the same firearm, constituted but one offense, the court below (R. 14–15) relied on its decision to the contrary in *Crapo* v. *Johnston,* 144 F. (2d) 863, certiorari denied, December 4, 1944. Relying on the "same evidence" test, petitioner now argues (Pet. 19–20), however, that under this Court's decision in *Rossi* v. *United States,* 289 U. S. 89, the only affirmative proof which the Government was required to adduce in support of both counts 1 and 3 was that he received and possessed the firearm, since failure to pay the tax and to register the firearm are negative averments, and that the Government's proof as to each count was therefore the same. Rather than furnishing support for petitioner's position, we submit that the *Rossi* decision firmly supports the Government's view that counts 1 and 3 relate to separate offenses. That case involved a conviction on two counts. One

count charged that the defendant carried on the business of a distiller without having given the bond required by R. S. 3260, and the second charged that he possessed and controlled a still not registered as required by R. S. 3258. The only issue before the Court was whether evidence showing that the defendant had custody and control of a still for the manufacture of alcoholic spirits was sufficient to support the convictions on both counts. In upholding the convictions, the Court held that "it is not incumbent on the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which if untrue could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control." (289 U. S. 89, 91–92.) Since the Court upheld the convictions on both counts, it is clear that regardless of what effect may be given to the negative averment doctrine, it does not operate to make what would otherwise be two offenses a single offense. In the *Rossi* case both counts concerned one still, just as counts 1 and 3 here concerned one firearm. Yet, as here, both counts related to a failure to comply with the law in a different respect and the defendant's convictions on both counts were upheld. In this case, the Government was required to prove in support of count 1, at least circumstantially, that petitioner

received and possessed a firearm upon which the tax had not been paid; in respect of count 3 the Government also bore the burden of separately establishing that petitioner wilfully failed to register the firearm with the Collector of Internal Revenue. As in the *Rossi* case, the two counts charged separate offenses and petitioner was thus properly sentenced on both.[5] Cf. *Blockburger* v. *United States,* 284 U. S. 299, 303–304.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the court below is correct. The case presents no conflict of decisions or important issue of law, and the petition for a writ of certiorari should be denied.

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Attorneys.

JANUARY 1945.

[5] None of the decisions upon which petitioner relies to establish a conflict (Pet. 5–9, 14–17, 18–24) involve the National Firearms Act and none involve precisely the same question under any other statute. Therefore, there is no basis for his contention that the decision below is in conflict with decisions in other circuits and with decisions of this Court.

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